IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2016

CORAM: WOOD CJ (MRS) PRESIDING
ADINYIRA (MRS) JSC
DOTSE JSC
ANIN YEBOAH JSC
GBADEGBE JSC
BENIN JSC
AKAMBA JSC

WRIT
NO.J1/8/2015

5TH DECEMBER 2016

MARTIN KPEBU

VRS

ATTORNEY-GENERAL

JUDGMENT

AKAMBA, JSC:

BACKGROUND

Following the adoption of the Constitution of Ghana in 1993, it was considered necessary to clean the statute books of obsolete and unwanted pieces of legislation and to among others, rationalize the titling of legislation in order to bring them in line with the new constitutional democracy.

This was the justification for the bill by which the Statute Law Revision Project (SLRP) was passed in 1998. (See Vol 20 No 23 Parliamentary Debates of 18th December 1998). The Statute Law Revision Commissioner (SLRC) (hereafter simply referred to as Commissioner) was given very far reaching powers to rewrite all the laws in plain English, to bring the language in line with current usage and to be in conformity with the Constitution. The full extent of the powers given the Commissioner would be discussed in this judgment. Ten years after the initiation of the project, seven revised volumes of the 'Laws of Ghana (Revised Edition)' were put before Parliament and adopted en masse or en bloc on 14th December 2006. They are however deemed to have come into force on 31st December 2004 as indicated in Volume 1 of the Laws of Ghana (Revised Edition).

Since the adoption of the new volumes, the plaintiff herein has some misgivings about certain changes in the resultant compilations. The plaintiff consequently issued a writ on 9th January 2015 invoking this court's original jurisdiction for the redress of his concerns as per the reliefs sought.

The reliefs sought by the plaintiff are as follows:

(i) "A declaration that the powers granted the Law Review Commissioner under section 2 of the Laws of Ghana (Revised Edition) Act, 1998 (Act

562) to "make adaptations of and amendments to Acts in order to bring those Acts into conformity with the Constitution of Ghana, 1992" does not include the power to make alterations of substance, and therefore the omission of marital consent as a defence for the use of force in section 42 (g) of the Criminal Offences Act, 1960, (Act 29) is null, void and of no effect for being contrary to article 93 (2) of the Constitution, 1992.

(ii) A declaration that the Constitution (1992) vests legislative power in Parliament and the amendment made to section 42 (g) of Act 29 is null, void and of no effect as it usurps the powers that the 1992 Constitution expressly, exclusively and specifically conferred to Parliament under 93 (2) of the 1992 Constitution.

(iii) A declaration that the statement by the Statute Law Revision Commissioner in the Laws of Ghana Revised Volume 3 page 111-1731 [Issue 1] footnote 16 that the exception under Section 42 (g) was omitted for being unconstitutional amounts to a usurpation of the judicial power which is solely vested in the Judiciary as provided by Article 125 (3) of the Constitution of Ghana, 1992 and is therefore null, void and of no effect.

(iv) A declaration that section 42 (g) of Act 29 can be amended only in accordance with the express provisions of Section 3 (2) (a) and (b) of the Laws of Ghana [Revised Edition] Act, 1998 (Act 562) and that the Commissioner's role is to prepare a Bill setting out the alteration or amendment for introduction into Parliament where such amendment is required."

Section 42 (g) of the Criminal Offences Act, 1960 (Act 29) which is at the centre of the present impasse, prior to the undertaking by the Statute Law Revision Commission, provided as follows:

"42. The use of force against a person may be justified on the ground of his consent, but –

(g) a person may revoke any consent which he has given to the use of force against him, and his consent when so revoked shall have no effect for justifying force; save that the consent given by a husband or wife at marriage, cannot be revoked until the parties are divorced or separated by a judgment or decree of a competent court."

The Laws of Ghana (Revised Edition) has however amended/changed the wording of s. 42 (g) of Act 29 by dropping the exception. The new formulation for s. 42 (g) is as follows:

"42. The use of force against a person may be justified on the ground of consent, but,

(g) a person may revoke a consent which that party has given to the use of force against that person, and the consent when so revoked shall not have effect or justify force."

What was the extent of the assignment given to the Statute Law Revision Commissioner (SLRC) under the enabling Act 562/1998 and whether or not the resultant outcome was mandated by the powers granted the Commissioner?

The Commissioner was granted very wide functions and powers. This is captured in section 2 of Act 562/ 1998 as follows:

"2. **Functions and powers of Commissioner**

(1) In the preparation of the Revised edition, the Commissioner

(a) shall omit

(i) all Acts or parts of Acts which have been expressly or specifically repealed or which have expired, become spent or ceased to have effect;

(ii) all repealing enactments contained in Acts and tables and all lists of repealed enactments whether contained in Schedules or otherwise;

(iii) all preambles to Acts where the Commissioner considers that the omission can conveniently be made;

(iv) all enactments prescribing the date on which an Act or part of an Act is to come into force where the Commissioner considers that the omission can conveniently be made;

(v) all amending Acts or parts of amending Acts where the Commissioner has incorporated the amendments in the Acts to which the amendments relate;

(vi) all enacting clauses;

(b) shall make adaptations of and amendments to Acts in order to bring those Acts into conformity with the Constitution of Ghana, 1992;

(c) may arrange any Act in such groups and sequence that may be convenient irrespective of the date of arrangement;

(d) may alter

i. the order of sections in any Act and renumber the sections;

ii. the form or arrangement of any sections by transferring words, by combining any sections or other sections, or by dividing any sections into two or more subsections;

(e) may transfer an enactment contained in an Act from that Act to any other Act to which that enactment properly belongs;

(f) may omit a chart, map or plan annexed to an Act;

(g) may divide Acts into parts or other suitable divisions;

(h) may alter the short title of an Act or add a short title to an Act which may require a short title;

(i) may re-designate Legal Notices as statutory instruments;

(j) may supply or add head notes;

(k) shall convert marginal notes to head notes;

(l) shall correct all grammatical, typographical and similar errors in the Acts and for that purpose the Commissioner may effect such alterations that are necessary whilst not affecting the meaning of any Act:

(m) may alter names, localities, offices, forms and methods in order to bring an Act into conformity with the circumstances of the country or the Commonwealth; and

(n) may do all other things relating to form and method that the Commissioner considers necessary to make perfect the Revised Edition.

(2) Despite subsection (1) the Commissioner may omit from the Revised Edition an Act which is in force on the 1st January, 2005,3(3) but which is repealed before the coming into force the Revised Edition.

3. **No power to make alteration of substance**

(1) The functions of the Commissioner contained in section 2 does not include a power to make an alteration or amendment in the matter or substance of an Act.

(2) Where the Commissioner considers

(a) that an alteration or amendment in the matter or substance of an Act is desirable , or

(b) that an Act requires considerable alteration or amendment involving the entire recasting of the Act,

the Commissioner shall prepare a Bill setting out the alteration or amendment or the recasting of the Act for introduction into Parliament.

4. **Power to omit specific enactments**

The Commission may, where the Commissioner considers it appropriate, exclude from the Revised Edition

(a) An Act of a personal nature;
(b) An Act of a temporary nature,

which can in the opinion of the Commissioner be conveniently omitted."

It is thus in the context of the powers conferred on the Commissioner under the project (supra) that the issues raised in this presentation can be resolved as to whether the deletion of the consent element in section 42 (g) of Act 29 was sanctioned under Act 562 of 1998.

ANALYSIS OF RELIEFS

The first relief sought by the Plaintiff is that the power granted the Commissioner to, as it were, 'make adaptations of and amendments to Acts in order to bring those Acts into conformity with the Constitution of Ghana, 1992' does not include the power to make alterations of substance, and therefore the omission of marital consent as a defence for the use of force in section 42 (g) of the Criminal Offences Act, 1960, (Act 29) is null, void and of no effect for being contrary to article 93 (2) of the Constitution, 1992'.

In any case reliefs (ii), (iii) and (iv) are so closely related to issue (i) and involve the same fact material that we would determine all of them together.

What is meant by the two expressions, 'adaptation and amendment'?

Adaptation, as defined by the **Oxford English Dictionary**, has a plurality of meanings and applications, most of which allude to the process of changing to suit an alternative purpose, function, or environment; the alteration of one thing to suit another. **The Oxford Modern English Dictionary, Edited by Julia Swannell (1995 Reprint)** defines the verb 'adapt' to mean, 'adjust (one thing to another); make suitable for a purpose; alter or modify (esp. a text). The same dictionary defines 'amend' as '(v) make minor improvements in (a text or a written proposal); correct an error or errors in (a document); make better; improve."

Article 93 (2) of the Constitution, 1992 states as follows:

"2. Subject to the provisions of this Constitution, the legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with this Constitution."

The Interpretation Act, 2009, (Act 792), provides in its section 10 some very useful guides to the interpretation of statutes which are deemed ambiguous or obscure.

The relevant parts of Section 10 read as follows:

"Aids to interpretation or construction

10. (1) Where a Court is concerned with ascertaining the meaning of an enactment, the Court may consider

(a) the indications provided by the enactment as printed, published and distributed by the Government Printer; …….

(2) A Court may, where it considers the language of an enactment to be ambiguous or obscure, take cognisance of

(a) the legislative antecedents of the enactment;

(b) the explanatory memorandum as required by article 106 of the Constitution and the arrangement of sections which accompanied the Bill; ……..

(e) the parliamentary debates prior to the passing of the Bill in Parliament.

(3) Subject to article 115 of the Constitution, a Court shall have recourse to parliamentary debates under subsection (2), where the legislative intention behind the ambiguous or obscure words is clearly disclosed in the parliamentary debate."

We begin the resolution of the issues by considering the nature of the assignment granted the Commissioner. The words used in the statute assigning the work to be undertaken by the Commissioner must first be understood by the ordinary meanings of the words used.

Where the meaning of the words used is plain and obvious, there is no need to resort to any other aids of interpretation unless the resort to that would be at variance with the intention of the lawmakers or lead to some absurdity. Abban, JSC (as he then was) in Ghana Bar Association v Attorney-General, (1994-95) Part 2 GBR 290 at 294 at stated thus:

> "It must also be borne in mind that in construing any statute, for that matter any of the provisions of the Constitution, the first duty of the court is to stick to the ordinary meaning of the actual words used. After ascertaining the general purport and the meaning of the provision in question from the words used, effect must be given to it, unless by so doing it would be at variance with the intention of the law makers or could result in or lead to some obvious absurdity."

A cursory look at the catalogue of assignments entrusted to the Commissioner under the Act 562 reveals the obvious huge volume of work and demands placed upon the Commissioner, yet very much was equally expected from him. As part of the huge expectation from him, the Commissioner is given the sole discretion to determine certain matters in the course of carrying out the assignment. Black's Law Dictionary, Eight Edition, by Bryan A. Garner defines discretion to mean 'Individual judgment; the power of free decision-making'. Sole discretion is also defined as 'an individual's power to make decisions without anyone else's advice or consent'. The Oxford Modern English Dictionary edited by Julia Swannell also defines discretion to mean, 'the freedom to act and think as one wishes, usually within legal limits.'

Section 3 of Act 562 of 1998 (supra) in particular confers upon the Commissioner the sole discretion to determine whether an alteration or amendment in the matter or substance of the Act is desirable. The section enacts that 'where the Commissioner considers that an alteration or amendment in the matter or substance of an Act is desirable or that an Act requires considerable alteration or

amendment involving the entire recasting of the Act' he shall prepare a bill to be put before Parliament.

When therefore the Commissioner determines that an alteration or amendment in the matter or substance under consideration is desirable he shall prepare a bill setting out the alteration or amendment for introduction to Parliament pursuant to Article 106 of the Constitution. This therefore also means that when the Commissioner arrives at a contrary view on a matter or substance the need for preparation of a bill for introduction before Parliament does not arise. Certainly this amounts to the grant of discretion to the Commissioner to exercise in accordance with law.

It is therefore obvious and beyond conjecture that the Commissioner's failure to, or refrain from, introducing a bill in Parliament under article 106, in this case, is in exercise of his discretion to the contrary. To borrow the words of **Francois, JSC,** in **Kuenyehia v Archer,** [**1993-94] 2 GLR 525,SC at 562,** '*rules of construction do not permit, a passage which has clear meaning, to be complicated or obfuscated by any interpolation, however well intentioned.'*

The Commissioner acted within the powers conferred by the enabling statute and could not be faulted in his election. Provided also that the Commissioner exercised his discretion fairly and candidly in accordance with article 296 of the Constitution 1992, he was within his powers to determine whether or not to resort to the process of introducing a bill in Parliament on any alteration or amendment.

What would be the basis for this court to hold that the changes made to s 42 (g) of Act 29/1960 are undesirable or unwarranted?

The Plaintiff has not alluded to any cause in his written submissions to enable us determine that the amendment/alteration to s. 42 (g) in question, is substantial for us to substitute same for the election made by the Commissioner under the circumstance. The Commissioner's discretion on the amendment was still subject to Parliamentary consideration.

The opportunity came when Parliament, which granted the Commissioner the power to undertake the revision exercise was presented with the concluded works. Significantly, Parliament did not complain about any of the matters presented to them, (including the amendment to s. 42 (g) of Act 29/1960) albeit en masse, and gleefully approved them pursuant to s.8 of Act 562/1998 and Article 106 of the Constitution, 1992.

Besides, the plaintiff has also not demonstrated to us that the legislative action taken by Parliament was clearly outside the legislature's Constitutional power.

Section 8 of Act 562/1998 states as follows:

"8. Effective date of Revised Edition.

(1) As soon as practicable after the completion of the Revised Edition, the Commissioner shall submit a set in bound book form to the Minister who shall lay it before Parliament.
(2) Parliament shall on a resolution passed for the purpose and supported by the votes of the majority of the members present and voting approve the Revised Edition to come into force on a date that the President may by executive instrument published in the Gazette specify.
(3) From the date specified as the date of the coming into force of the Revised Edition under subsection (2), the Revised Edition shall have the force of law as the sole Statute Book in respect of the Acts in force on the 1st January, 2005." [Emphasis mine]

It is therefore clear in the light of s. 8 (above) that Parliament acted within its powers when it duly adopted and passed the seven volumes of the Laws of Ghana (Revised Edition) on 14th December 2006 and thereby assumes responsibility for them. In the result, the fact narrative surrounding the adoption of the seven volumes of the Laws of Ghana (Revised Edition) detracts from it being contrary to article 93 (2) of the Constitution 1992. In other words there is no factual basis before us, to support the claim that the seven volumes were not the making of Parliament. Thus, the omission or deletion of marital consent as a defence for the use of force in section 42 (g) of the Criminal Offences Act, 1960, (Act 29) having

been adopted pursuant to the approval of Parliament, even if considered an alteration or amendment of substance, cannot be attributed to the Commissioner but to Parliament. The law aids the vigilant, not those who sleep (Vigilantibus et non dormientibus juras ubveniunt).

It is however a sad commentary that Parliament failed to live up to the trust reposed in them by the people of Ghana by their failure to be the true watchdog in such crucial matter. This is because the deliberations on the adoption of the seven volumes of the Laws of Ghana (Revised Edition) were hasty, superficial and lacked any commitment.

There was no indication of any elaborate study and scrutiny of the volumes for any informed contributions by members who were just satisfied to pass them. The result is the unraveling, too late in the day, of far reaching changes that perhaps were never contemplated.

Some of the changes or amendments have far reaching consequences for our criminal justice system and are already unsettling decisions fashioned over the years by our courts. Yet Parliament approved them all, and takes full responsibility for them all. Besides, even if there had been any mistakes, this court cannot correct them. Let me conclude this point by referring to the words of the champion of the philosophy of judicial self restraint, Justice Frank further, in his dissenting opinion in the case of **Trop v Dulless 356 US 86 (1958) at 120** cited in part by Kpegah, JSC in **Ghana Bar Association vs Attorney General [2003-2004] SCGLR, 250 at 309** as follows:

> *"Rigorous observance of the difference between limits of power and wise exercise of power -- between questions of authority and questions of prudence -- requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence*

in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do."

SOME DECISIONS ON AMENDED LAW

There is no doubt from our analysis of events above that this court's decision in the unreported case of **Ekene Anozie v The Republic, Criminal Appeal No. J3/6/2014, SC, delivered on 13th May 2015** which expresses a contrary position was given per in-curiam hence we would depart there from, pursuant to article 129 (3) of the Constitution. In the Ekene Anozie case (supra) we utterly failed to consider whether the changes resulting from the Commissioner's adaptations/amendments on the law on conspiracy fell within the mandate granted him, and thereby fell into the error of merely upholding the decision of the Court of Appeal without due consideration and thus endorsing the impression that the Commissioner's amendments were void.

In this vein, the decision of the High Court, Accra, coram, Marful Sau, J.A, sitting as an additional High Court judge in the case of **Rep vs Augustine Abu, No Acc 15/2010 delivered on 23/12/2009 (Unreported)** which acquitted the accused persons on two counts of conspiracy to commit robbery was correct. The High court reasoned that the new formulation by the Commissioner had changed the old law on conspiracy such that proof of prior agreement to act together with a common purpose is now a new and necessary ingredient that must be proved by the prosecution, failing which the charge must fail. This is a correct position of the law on conspiracy as it accords with our conclusion that the Commissioner's seven volumes of the Laws of Ghana (Revised Edition) having received the necessary Parliamentary approval and adoption, every statement of the law therein contained is the correct position thereof unless pronounced otherwise.

RELEVANCE OF ENGLISH CASE

Just before we adjourned this matter for a decision, the plaintiff brought to our attention the English case of **Regina and R. (H.L) 1992 A.C. 599** for our consideration.

Owing to the high premium the Plaintiff attaches to the case I would recount the facts briefly here below: The defendant married his wife in 1984. As a result of matrimonial difficulties the wife left the matrimonial home in 1989 and returned to live with her parents, informing the defendant of her intention to petition for divorce. The defendant also communicated to the wife his intention to 'see about a divorce'. While the wife was staying at her parents' house, the defendant forced his way in and attempted to have sexual intercourse with her, in the course of which attempt he assaulted her. He was charged on indictment with rape and assault occasioning actual bodily harm. The judge rejected his submission that by virtue of section 1 (1) of the Sexual Offences (Amendment) Act 1976 the offence of rape was one which was not known to the law where the defendant was the husband of the alleged victim. He thereupon pleaded guilty to attempted rape and assault occasioning actual bodily harm and was convicted.

On the defendant's appeal against his conviction of attempted rape, the Court of Appeal (Criminal Division) dismissed the appeal. On further appeal by the defendant it was held dismissing the appeal, that there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband; and that, therefore, a husband could be convicted of the rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse; that section 1 (1) of the Sexual Offences (Amendment) Act 1976 did not give statutory recognition to and perpetuate the former rule; and that, accordingly, the defendant's conviction would be upheld.

It is baffling that the plaintiff was so delighted in drawing our attention to the above referenced English case which has no relevance to the issues in contention before us.The question before the English judge was whether in those circumstances, despite the wife's refusal to consent to sexual intercourse, the wife must be deemed by the fact of marriage to have consented.

This raised the further question whether there is any basis for the principle, long supposed to be part of the common law, that a wife does by the fact of marriage give an implied consent in advance for the husband to have sexual intercourse with her; assuming that principle at one time existed, it still represents the law in either a qualified or unqualified form. These questions are far at variance with the issues praying for our resolution in this present matter.

CONCLUSION

The reasoning in **Edusei vs Attorney General (1996-97) SCGLR 1** concerning the discernment of the true nature of the claim from the pleadings and reliefs as concisely stated by Bamford Addo, JSC holds good. Therefore gleaning from the reliefs sought by the plaintiff, it is clear that he is praying for declarations to the effect that the powers granted the Commissioner to revise the laws of Ghana did not extend so far as to authorize him to omit s. 42 (g) of Act 29 from the Criminal Code. In other words this court should declare that the Commissioner acted in excess of the powers conferred upon him.

Consequently, having juxtaposed the reliefs sought by the plaintiff with the powers granted the Commissioner under Act 562 of 1998 and having examined the process followed by Parliament in adopting the outcome of the whole exercise, we have come to the conclusion that the Commissioner performed his mandate according to the powers granted him. The resultant product, same being the seven volumes of the Laws of Ghana (Revised Edition) having been approved and adopted by Parliament are now the product or handiworks of Parliament, to all intents and purposes. The Plaintiff is therefore not entitled to relief one.

For the same reasons as for relief (i), reliefs (ii), (iii) and (iv) also fail as the actions of the Commissioner pursuant to the wide powers conferred on him by sections 2, 3, 4 and 8 of Act 562/1998 were duly exercised in accordance with the law culminating in the adoption of the resultant outcome by Parliament on 14th December 2006.

EPILOGUE

According to **Walter Benjamin** in his book, '**Illustrations**' (New York, Schocken Books 1968, 223-5) and **Hutcheon**, '**A Theory of Adaptations'** 4, 173,): "The test of a good adaptation is one which achieves repetition without replication, - rather than being a mere copy which sheds its Benjaminian aura, the adaptation both evokes and is amplified by a user's experience of the original, while also taking on distinct qualities of its own. A successful adaptation balances "the comfort of ritual and recognition with the delight of surprise and novelty", not only carrying aura with it, but contributing to its continued expansion."

In conclusion let me commend the Plaintiff for his bold initiative in filing this action which has brought clarity to this matter. Despite the outcome of the initiative which did not favour him, it should propel a closer study and identification of individual pieces and areas of the laws that were affected by the mass adoption, for rectification by specific amendments by Parliament at the initiative of the Attorney General so as to rectify excesses or shortcomings.

The need for such an initiative is prompted by our conclusion by this decision, that the seven volumes of the Laws of Ghana (Revised Edition) constitute the current state of the law contained therein.

Failure to embark upon the initiative for specific amendments will result in continued difficult times particularly for our criminal justice system, as was encountered in the Augustine Abu case (supra), among others. In setting out areas of concern, care must however be taken not to rope in areas that were deliberately changed in order to align with new trends. As the old order of dealing with society changes under our eyes, there is need to keep our laws in pace with these changes but this must be undertaken with great caution to keep in line with the laudable objectives set under the Constitution 1992.

In the result all the declarations sought by the plaintiff are denied. The plaintiff's writ is dismissed.

Before I am finally done, My Lady Chief Justice, Presiding, my lords and lady, this being my ultimate judgment on the bench after almost forty years of service, indulge me one more time, to take the liberty to wish for the bench and bar in particular the continued support and co-operation necessary for nurturing our nascent democracy to the highest level deserving of the people of Ghana in integrity, competence, efficiency and effectively. It is for this confidence that the people of Ghana have entrusted to the Judiciary the power to administer justice on their behalf. The very success of our democracy depends upon a strong competent and impartial judiciary which has been the case over the years and must be sustained. The bar has this duty, being officers of the court, to always work for the success of this confidence and to sustain the symbiotic relation to each other.

(SGD) J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

WOOD (MRS) C J

I agree

(SGD) G. T. WOOD (MRS)
CHIEF JUSTICE

ADINYIRA (MRS) JSC

I agree

(SGD) S. O. B. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

DOTSE JSC

I agree

(SGD) V. J. M. DOTSE
JUSTICE OF THE SUPREME COURT

ANIN YEBOAH JSC

I agree

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JUSTICE OF THE SUPREME COURT

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I agree

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